(9)

Supreme Court, U.S.
FILED
JUN 22 2001
OFFICE OF THE CLERK

No. 00-1751

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN,
Superintendent of Public Instruction of Ohio, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

PETER J. FERRARA
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
1220 Rosencrans Street
Suite 325
San Diego, CA 92106
(619) 222-0770

Counsel for Amicus Curiae
American Civil Rights Union

23 pp

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THIS CASE PRESENTS A QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH IS OF THE UTMOST IMPORTANCE 3

II. STATE AND FEDERAL APPELLATE COURT DECISIONS ARE IN DEEP CONFLICT OVER THE ISSUES PRESENTED BY THIS CASE 7

III. THE SIXTH CIRCUIT'S DECISION BELOW CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES:

Agostini v. Felton, 521 U.S. 203 (1997) 7, 10, 12, 13, 14, 15, 16

Bagley v. Raymond School Dep't, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999) 12

Campbell v. Manchester Bd. of School Directors, 641 A.2d 352 (Vt. 1994) 12

Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973) 3, 12, 15, 16, 17

Jackson v. Benson, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998) 11

Kotterman v. Killian, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999) 12

Lemon v. Kurtzman,, 403 U.S. 602 (1971) 13

Mitchell v. Helms, 530 U.S. 793 (2000) 7, 10, 12, 17

Mueller v. Allen, 463 U.S. 388 (1983) 7, 10, 12, 13, 16

Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) 7

Strout v. Albanese, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999) 12

Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986) 7, 10, 13

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) 7, 13

Table of Authorities continued

Page(s)

STATUTES:

Ohio Revised Code

Sect. 3313.976(A)(8) 8
Sect. 3313.978(A) 8
Sect. 3317.02(B),(N) 9
Sect. 3317.03(I)(1) 9
Sect. 3317.08(A)(1) 9
Sect. 3327.061 9

OTHER PUBLICATIONS:

Bourque et al., Office of Education Research and Improvement, U.S. Dept. of Education, 1996 Science Performance Standards: Achievement Results for the Nation and the States, *Findings from the National Assessment of Educational Progress* (1997) 4

Chubb and Moe, *Politics, Markets and America's Schools* (1990) 5

Coleman, Public Schools, Private Schools, and the Public Interest, 64 *The Public Interest* 1 (1981) 6

Commonwealth of Pa. Legis. Jrnl., Dec. 11, 1991, 175th Sess. 6

Commonwealth of Pa. Legis. Jrnl., June 16, 1995, 179th Sess. 6

Evans and Schwab, Do Catholic Schools Make a Difference?, *The Quarterly Journal of Economics* (1995) 6

Table of Authorities continued

Page(s)

Frase, et al., Office of Education Research and Improvement, U.S. Dept. of Education, Pursuing Excellence: A Study of U.S. Fourth Grade Mathematics and Science Achievement in International Context, *Findings from the Third International Mathematics and Science Study* (1997) 4

Friedman, *Capitalism and Friedman* (1962) 5

Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* (1999) 6

Hoxby, The Effects of Private School Vouchers on School Students, *Holding Schools Accountable* (ladd, ed. 1996) 6

Indiana University, *Evaluation of the Cleveland Scholarship and Tutoring Grant Program (1996-1999)* 6

Martin, et al., *Science Achievement in the Primary School Years* (1997) 4

Mulis, et al., *Mathematics and Science Achievement in the Final Years of Secondary School* (1998) 4

Mulis, et al., *Mathematics Achievement in the Primary School Years* (1997) 4

National Center for Education Statistics, *The Nation's Report Card: Fourth Grade Reading 2000* 4

National Center for Education Statistics, *NAEP 1998 Reading Report Card for the Nation* 4

National Center for Education Statistics, *NAEP 1998 Civics Report Card for the Nation* 4

Table of Authorities continued

Page(s)

Neal, The Effects of Catholic Secondary Schools on Educational Achievement, 15 *J. Labor Econ.* 98 (1997) 6

Peterson and Hassel, eds. *Learning from School Choice* (1998) 6

Peterson, Myers, and Howell, Harvard University Program on Education Policy and Mathematica Policy Research, *An Evaluation of the New York City School Choice Scholarship Program: The First Year* (1998) 6

Rees, *School Choice: What's Happening in the States 2000* 5

Witte, *The Market Approach to Education: An Analysis of America's First Voucher Program* (2000) 6

INTEREST OF AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Director of the U.S. Commission on Civil Rights Linda Chavez, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., former Editor-in-Chief of the Reader's Digest and former Director of the Voice of America Kenneth Y. Tomlinson, and nationally syndicated columnist Joseph Perkins

This is precisely the sort of case that is of interest to the ACRU, because we are most concerned about protecting those whose rights and liberties may be overlooked or infringed due to political correctness or other political bias. In this case, we seek to defend the liberty interests of parents and students in attending the school of their choice.

SUMMARY OF ARGUMENT

This case squarely meets all of the classic criteria for granting a petition for a writ of certiorari, in the boldest and most overwhelming fashion.

---

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief has been granted by the parties. Their letters of consent are enclosed with this brief.

First, this case presents a Federal question that is critically important to the people of this country. A strong, broad, national movement has developed in favor of school choice programs allowing parents and students to use state funds in various forms for the school of their choice, public or private, religious or non-religious. This movement has grown to address a major, urgent problem facing our nation – poorly performing and deteriorating public schools. The movement is grounded in a secular economic analysis of the best means for addressing this problem, as well as a secular political philosophy favoring freedom of choice for its own sake. Legislative success for school choice has now been achieved in several states, and legislation is advancing in many more. In short, the issue of school choice is one of the top policy questions facing our country.

This case presents the question of the constitutionality of a classic school choice measure under the Establishment Clause. Consideration of school choice reforms is now bogged down all over the country in the confusion over this issue. This case presents the question in a clearly defined manner with a well-developed factual record.

Secondly, conflict regarding the proper answer to this question rages among courts all across our land. Indeed, there is a conflict in this very case between the Supreme Court of Ohio and the 6th Circuit Court of Appeals, two courts of equal standing. In addition, while the Supreme Courts of Wisconsin, Arizona, and Vermont agree with Ohio, the Maine Supreme Court and the First Circuit Court of Appeals agree with the Sixth Circuit in this case. Consequently, there is a deep split among state and Federal appellate courts which only this Court can resolve.

Finally, the 2-1 decision of the Court below is in conflict with a major line of decisions of this Court over the past 30 years. The school choice program in this case simply allows

private, religious schools to participate in a general secular framework as one of many options, on the same terms and conditions as everyone else. It is comprehensively neutral in regard to religion, and decisions as to which schools receive state funds are not made by the state, but by the families, primarily low income and minority, eligible to participate in the program.

The majority below found this arrangement unconstitutional based on the older case of *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). But their analysis flies in the face of just about every school financing case under the Establishment Clause decided by this Court since that time.

We predict, in fact, that this case will be used in law schools in future years as the classic example of how to satisfy the criteria for the granting of a petition for a writ of certiorari.

ARGUMENT

I. THIS CASE PRESENTS A QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH IS OF THE UTMOST IMPORTANCE

The failures of our public schools have been a central concern of policymakers all across our country for at least 20 years. An enormous amount of funding is devoted to education in the U.S. each year, over 7% of GDP, with the great majority of that spent on public education.[2] Yet, the performance of public schools in terms of academic achievement has been considered poor as measured by national and international

---

[2] U.S. Department of Education, *Digest of Education Statistics 1998* (*http://nces.ed.gov/pubs99/digest98/d98t031.html*).

tests, and other measures.[3] Indeed, on some international tests, U.S. students perform more poorly the longer they are in school.[4]

The problems are most acute in our nation's lowest income areas, particularly among minority students. The most recent national test results show that over half of black and Hispanic 4th graders in the U.S. cannot read at the most basic level.[5] Moreover, the gap in achievement between black and white students has been widening for almost 10 years.[6] Low income and minority schools are also often plagued by violence, physical deterioration, high drop out rates, and drug and alcohol abuse.

To address these critical problems, a strong national movement has developed in favor of school choice programs allowing parents and students to use state funds in various

---

[3] See, e.g., National Center for Education Statistics, *The Nation's Report Card: Fourth [illegible]e Reading 2000;* National Center for Education Statistics, *NA[illegible] Reading Report Card for the Nation;* National Center for Education S[illegible]istics, *NAEP 1998 Civics Report Card for the Nation;* Frase, et al., Pursuing Excellence: A Study of U.S. Fourth-Grade Mathematics and Science Acheivement in International Context, *Findings from the Third International Mathematics and Science Study,* Office of Education Research and Improvement, U.S. Dept. of Education (1997) Bourque, et al., 1996 Science performance Standards: Achievement Results for the Nation and the States, *Findings from the National Assessment of Educational Progress*, Office of Education Research and Improvement, U.S. Dept. of Education (1997).

[4] Mulis, et al., *Mathematics and Science Achievement in the Final Year of Secondary School* (1998); Mulis, et al., *Mathematics Achievement in the Primary School Years* (1997); Martin, et al., *Science Achievement in the Primary School Years* (1997).

[5] National Center for Education Statistics, *The Nation's Report Card: Fourth Grade Reading 2000.*

[6] Id.

forms for the school of their choice, public or private, religious or non-religious.[7] This case involves the classic form of providing such funding – school vouchers.

This movement grew out of a secular economic analysis of the best means for addressing this problem.[8] School choice would create competition, forcing public schools to improve or lose students. Parents and students in any event would be able to gravitate to the schools that performed the best, improving overall education results. Most importantly, low income and minority students would be able to choose schools that offered a sound education, enabling them to escape a life of poverty.

Moreover, through the resulting education marketplace, innovative new education ideas could be tried across the country on a decentralized basis. The market would then embrace those that were proven to work best. The market would also offer a diversity of education choices to the public, allowing different parents and students to choose the school that worked best for them.

The school choice movement is also grounded in a secular political philosophy that favors freedom of choice in its own right.[9] Quite clearly, the school choice movement is not about providing aid to religious schools. It is about a secular economic analysis concerning the best means for improving schools, and a secular, freedom-oriented political philosophy.

The school choice experiments and programs that have been adopted are now being extensively studied across the country. These studies indicate that school choice is successful

---

[7] See, e.g., Rees, *School Choice: What's Happening in the States 2000.*

[8] See, e.g., Friedman, *Capitalism and Freedom* (1962); Chubb and Moe, *Politics, Markets and American Schools* (1990).

[9] See, e.g., Friedman, *supra*

in improving education, particularly for the most vulnerable low-income and minority children.[10]

In short, the issue of school choice to address our education problems is one of the top policy questions facing the country. However, efforts to adopt school choice programs are bogged down all over the land in confusion over the constitutionality of such programs under the Establishment Clause. Opponents seek to stifle legislative consideration of school choice initiatives on these constitutional grounds.[11] Any school choice initiative that is adopted is smothered in litigation.

This case involves the urgent, critical issue of the constitutionality of school choice programs. It presents the question of the constitutionality of a particular, classic school choice program that is representative of school choice initiatives advancing across the country. The question is clearly framed, with all state law questions previously decided

---

[10] Peterson and Hassel, eds., *Learning from School Choice* (1998); Hoxby, The Effects of Private School Vouchers on Schools and Students, *Holding Schools Accountable* (Ladd, ed., 1996); Witte, *The Market Approach to Education: An Analysis of America's First Voucher Program* (2000); Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland (1999);* Indiana University, *Evaluation of the Cleveland Scholarship and Tutoring Grant Program (1996-1999);* Neal, The Effects of Catholic Secondary Schooling on Educational Acheivement, 15 *Journal of Labor Economics* 98 (1997); Evans and Schwab, Do Catholic Schools Make a Difference?, *The Quarterly Journal of Economics* (1995);Coleman, Public Schools, Private Schools, and the Public Interest, 64 *The Public Interest* 1 (1981); Peterson, Myers and Howell, Harvard University Program on Education Policy and Mathematica Policy Research, *An Evaluation of the New York City School Choice Scholarship Program: The First Year* (http:/data.fas.harvard.edu/pepg/NewYork-First.htm.).

[11] See, e.g., *Commonwealth of Pa. Legis. Jrnl.*, Dec. 11, 1991, 175th Sess. at 1928, June 16, 1995, 179th Sess. at 1464.

by the Ohio Supreme Court. The factual record is thoroughly developed to present the question to this Court.

The urgency and importance of the Federal question presented by this case could not be more clear.

II. STATE AND FEDERAL APPELLATE COURT DECISIONS ARE IN DEEP CONFLICT OVER THE ISSUES PRESENTED BY THIS CASE

The importance of the question presented by this case is joined by a deep conflict among state and Federal appellate courts on that question.

Indeed, the conflict is so deep that two appellate courts of equal dignity have split on the question in the very case now presented to this Court. The Ohio Supreme Court originally decided this case in *Simmons-Harris v. Goff*, 711 N.E. 2d 203 (Ohio 1999), as the respondents here first brought this action in state court. The Ohio court rejected respondents' claim that the Cleveland school voucher program violated the Establishment Clause, in direct and complete conflict with the later Sixth Circuit decision below.

The Sixth Circuit ruled that this case was governed by this Court's decision in *Nyquist*. The Ohio Supreme Court ruled that *Nyquist* did not govern, but, rather, that this case was controlled by a later line of decisions of this Court, including *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Dep't Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000).

The Sixth Circuit held that this case turned on the fact that the great majority of private schools that received the voucher funds were religious, and the great majority of families utilizing the vouchers chose such schools. The Ohio Supreme Court held that this was irrelevant to the constitutional analysis.

Rather, the Ohio Court ruled that the case turned on the fact that the funds were channeled through the choices of parents and students. They determined where the funds went, not the state. But the Sixth Circuit found this unpersuasive.

The Ohio Supreme Court considered the voucher program in the broad context of all the choices offered to parents and students in the Cleveland School district. These parents may choose neighborhood public schools, such schools supplemented by personal tutoring financed by the voucher program, suburban public schools that may choose to participate in the voucher program, community, or charter, schools, private non-religious schools, private religious schools, and, indeed, home schooling. The Sixth Circuit took a very narrow approach, ruling that all other choices except those offered by the by the vouchers themselves were "at best irrelevant". (App.[12] 25a). The Sixth Circuit consequently evaluated the vouchers out of their complete policy context.

The Sixth Circuit misread the state statutory scheme to discern an incentive in the program favoring private religious schools, which does not exist. The statute caps the tuition that may be charged for low income students in the program at $2,500 per year. RC[13] 3313.976(A)(8); 3313.978(A). This includes a maximum of $2,250 from the voucher and $250 paid by the student's family. This is the most that private religious schools can obtain under the program for each low-income student.

The Sixth Circuit concluded that the reason no suburban public school had agreed to participate in the voucher program was that such funding was inadequate for their cost structure.

---

12 "App." refers to the appendix provided by the Institute for Justice representing petitioning intervenors Senel Taylor et al.

13 "RC" refers to the Ohio Revised Code.

But the much leaner and cost effective private religious schools could operate under this funding limitation. Consequently, in the Court's view, the program was structured to favor participation by the private religious schools, depriving families of a true choice of schools. (App. 29).

But exactly contrary to the decision of the Sixth Circuit, the statutory scheme provides much more funding for the choice of public schools and is actually skewed to favor those schools over private religious schools. If a family in the Cleveland voucher program chose a suburban public school, that school would receive not only the $2,250 paid by the voucher. It would also receive the state's regular funding allocation for each student in the public schools, which was an additional $4,294 during the 2000-2001 school year. RC 3317.03(I)(1), 3327.061, 3317.08(A)(1), 3317.02(B),(N). Consequently, the suburban public schools would have received $6,544 for each voucher student they enrolled last school year, compared to $2,250 for a private religious school.

In addition, several non-religious private schools participate in the voucher program. But these schools have the additional option of registering as community, or charter, schools, an option not available to private religious schools. Community schools receive over $4,500 in funding per student each year, and offer Cleveland parents another full schooling choice. RC 3317.02(B),(N); Affidavit of Steven Puckett, para. 14; Declaration of David P. Zanotti.[14] Of course, Cleveland parents can also always choose the Cleveland public schools, which received $7,097 in state funding per student in the last school year. Id.

Finally, a low-income family that chooses a private religious school under the voucher program must pay 10% of

---

14 All nonpublished materials cited in this brief are admitted into the record.

the school's tuition up to $250 per year. All families above this income level must pay still more, as the vouchers will pay only 75% of school tuition up to a maximum payment of $1,875, leaving the families responsible for all costs above that. But families pay nothing if they choose a private non-religious school in the community school program, a Cleveland public school, or a suburban public school.

Consequently, the Sixth Circuit read the statutory framework applying to the choices of parents in the Cleveland school system exactly backwards. Rather than favoring private religious schools, the statutory framework disfavors those schools. In contrast, the Ohio Supreme Court did not misread the state's statutory framework and found no incentive favoring the choice of private religious schools.

The Sixth Circuit concluded that "unlike *Mitchell, Agostini, Witters, and Mueller,* the Ohio Scholarship Program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria." App. 32-33. In direct contrast, the Ohio Supreme Court ruled that the voucher plan maintained strict neutrality in regard to religion, based precisely on *Agostini, Mitchell, Witters,* and *Mueller.*[15]

---

[15] Regardless of whether the decision of the Ohio Supreme Court should have amounted to collateral estoppel on the Establishment Clause issue before the Sixth Circuit, the state Supreme Court did rule on the question, and not merely issue dicta. The court went on to strike down the voucher statute because it was enacted as part of the state budget violating the state constitution's single subject rule. But the court then stayed its ruling on the point to give the legislature time to reenact the voucher plan in a separate stand alone bill, which it did. By issuing this stay, the court made the part of its ruling upholding the voucher plan on the Establishment Clause issue fully operative. Indeed, how could the court issue a stay to leave in place an unconstitutional violation of the Establishment Clause? The stay required a ruling on the Establishment Clause issue to make any legal sense.

The Wisconsin Supreme Court agreed with the Ohio court, and thoroughly disagreed with the Sixth Circuit, in ruling on a Milwaukee voucher plan remarkably similar to the plan in Cleveland. *Jackson v. Benson,* 578 N.W.2d 602 (1998).

Like the Ohio plan, the Wisconsin plan provided vouchers to students from low-income families stuck in failing public school districts. Parents would again receive the vouchers and endorse them over to the school of their choice. Just like in Ohio, most of the schools participating in the Wisconsin plan were religiously affiliated. Wisconsin also made no effort to restrict the use of voucher funds to non-religious activities.

Like the Ohio court, the Wisconsin court ruled this program constitutional because it "provide[s] public aid to both sectarian and non-sectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion, and (2) only as a result of numerous private choices of the individual parents of school children." 578 N.W.2d at 617. The court consequently found the voucher plan in complete

---

Moreover, if the court did not rule on the Establishment Clause issue, then what happened to that issue in the case? Issuing the stay to keep the voucher statute in place until the single subject problem could be remedied meant that the court did not dispose of the case on the single subject question. The voucher plan still remained in place and the court had to issue a ruling on its constitutionality under the Establishment Clause, which it did. That Establishment Clause issue is now fully settled in the Ohio courts, which is why the respondents started anew in the Federal courts rather than going to back to state court.

Indeed, Respondents could have sought certiorari based on the Ohio Supreme Court's ruling because the Ohio legislature remedied the single subject problem before the time for requesting certiorari from this Court had expired. Respondents decided themselves to start over in the Federal courts.

In any event, the Ohio Supreme Court has told us what it thinks about the Establishment Clause issue in this case, and it is in deep conflict with the Sixth Circuit on the question

accord with the criteria established in *Agostini*. Again like the Ohio court, the Wisconsin court distinguished *Nyquist* because the program in that case directed aid "exclusively to private schools and their students," Id. at 614 n.9, while the Wisconsin plan followed the Ohio plan in providing funding to both public and private school students.

The Wisconsin Court also rejected the Sixth Circuit argument that the voucher plan was unconstitutional because the great majority of participating schools were religious, reflecting this Court's precedents in *Mueller, Agostini,* and *Mitchell.* 578 N.W.2d at 619n.17. Again following the Ohio court, the Wisconsin court also examined the full range of options available to public school students in Milwaukee, not just the choices available with voucher funds. In the context of this full range of choices, the Milwaukee program was clearly neutral towards religion. 578 N.W.2d at 614n.9, 618.

The Vermont Supreme Court, in *Campbell v. Manchester Bd. of School Directors,* 641 A.2d 352 (1994), and the Arizona Supreme Court, in *Kotterman v. Killian,* 972 P.2d 606, *cert. denied,* 528 U.S. 921 (1999), have joined Wisconsin and Ohio in upholding the constitutionality of school choice programs. In contrast, the Maine Supreme Court, in *Bagley v. Raymond School Dep't,* 728 A.2d 127, *cert. denied,* 528 U.S. 943 (1999), and the First Circuit Court of Appeals, in *Strout v. Albanese,* 178 F.3d 57, *cert. denied,* 528 U.S 931 (1999) have joined the Sixth Circuit in finding school choice programs unconstitutional under the Establishment Clause.

This deep conflict among appellate courts across the country is creating confusion and gridlock in the critical area of education reform. Only this court can perform the critical task of resolving this conflict, and enabling education reform to move forward.

III. THE SIXTH CIRCUIT'S DECISION BELOW CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT

The dissent below clearly elucidates exactly how the 2-1 decision there flagrantly contradicts established precedents of this Court.

Judge Ryan's dissenting opinion in fact shows that the Ohio voucher plan clearly satisfies the criteria established by this Court in *Agostini* to determine the constitutionality of public funding for education initiatives involving the private sector. *Agostini* established three criteria for determining whether such publicly funded initiatives have the primary effect of advancing religion, which would make the initiative unconstitutional under the traditional Establishment Clause test of *Lemon v. Kurtzman,* 403 U.S. 602 (1971). These three criteria are:

> (1) whether the public financing in the program results in government indoctrination;
>
> (2) whether the program defines its recipients by reference to religion;\
>
> (3) whether the government financing creates an excessive entanglement between government and religion.

521 U.S. at 234.

As Judge Ryan notes, a long line of precedents of this Court establishes that there is no indoctrination of religion where the funds go to parents and students who make a "genuinely independent and private choice" to direct their share of the funds to a particular private religious school. App. 50-51. These precedents include *Mueller, Witters, Zobrest, Agostini,* and *Mitchell.*

That is precisely the situation in the Ohio voucher plan in this case. As discussed, parents and students choose the school to receive the voucher funds, and the parent signs the voucher over to the school. That decision is made in the context of the broadest possible array of choices for Cleveland parents, again including staying in their own neighborhood public school, supplementing that education with private tutoring financed at least in part by the voucher program, choosing a private, non-religious charter or community school, choosing a suburban public school that has agreed to participate in the program, choosing a non-religious private school with a voucher, and home-schooling, in addition to the choice of using the voucher for a private, religious school. As Judge Ryan aptly states, "It is difficult to imagine a statute that could afford its voucher recipient a broader spectrum of educational choice." App. 51.

The Ohio voucher plan also clearly does not define its recipients by reference to religion. Recipients become eligible for the plan if they reside in the Cleveland public school district, which has been chosen for the new program because of its dismal educational performance. Those eligible are granted a first priority to participate in the program if their family income is less than 200% of the poverty line. The voucher plan also prohibits participating schools, including private, religious schools, from using any religion test for admission. Clearly, eligibility for the program is defined wholly in terms of religiously neutral, secular criteria, with no reference to religion.[16]

Therefore, the Ohio voucher plan is constitutional under *Agostini,* decided just four years ago.

---

[16] No one in this litigation has suggested that the Ohio plan involves an excessive government entanglement with religion. It has also been conceded that the purpose of the Ohio plan is not to advance religion, but the wholly secular one of meeting the educational needs of children in failing public schools, particularly low-income and minority children.

But the majority opinion below all but ignored *Agostini* and held that the factually distinguishable and doctrinally outdated, almost 30 year old *Nyquist* decision governs this case. *Nyquist* found a New York state program to aid private schools unconstitutional. But the explicit purpose of that program was to provide funding for financially troubled, predominantly religious private schools, to avoid a costly influx of their students into public schools. The purpose of the Ohio voucher plan, by contrast, is to provide assistance primarily to low income students trapped in poorly performing public schools to obtain a better education through a broad range of public and private alternatives.

Moreover, the New York program considered in *Nyquist* provided direct financial grants to New York's private, mostly religious schools. The Ohio voucher plan provides no such grants. Rather, it again provides assistance to parents and students and they direct the funds to the school of their choice.

In addition, *Nyquist* explicitly reserved decision on "a case involving some form of public assistance (e.g. scholarships) made available generally without regard to the sectarian/non-sectarian or public/non-public nature of the institution benefited." 413 U.S. at 782n.30. That reserved issue is precisely the issue presented to by the Ohio plan. Through that plan, assistance is provided generally to families in poorly performing public schools, from which they can benefit regardless of whether they choose to improve their education in sectarian or non-sectarian and public or private schools. Consequently, *Nyquist* cannot govern this case because it explicitly reserved the question presented by this case.

Most importantly, the criteria and analysis of *Nyquist* have now been modified by the string of school financing cases decided since then. *Agostini* explicitly crystallized these changes with the establishment of a new analytical framework with new criteria. The majority below clearly should have

used this new framework rather than the outdated *Nyquist* decision. By obtusely ignoring *Agostini* and going back to *Nyquist*, the majority below seems to be resisting and ultimately flouting *Agostini*, effectively rewriting the law this Court thought it had established there.

Following *Nyquist* rather than *Agostini*, the majority below relied heavily on the fact that the great majority of private schools participating in the voucher plan are religiously affiliated, and the great majority of voucher students attend those schools. The majority below ruled that this fact meant that the voucher plan had the primary effect of aiding religion in violation of the Establishment Clause.

But this again flatly contradicts the post-*Nyquist* decisions of this Court. The tax deductions available in *Mueller* were used in the same overwhelming proportion for expenses related to private religious schools. But the Court held that this was irrelevant to the constitutionality of the program, saying

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stand in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.

463 U.S. at 401.

Similarly, in *Agostini* over 90% of the private schools participating in the program at issue were religious. The Court nevertheless held that the constitutionality of the program did not turn on the proportion of participating schools that are religious. The Court said, "Nor are we willing to conclude that the constitutionality of an aid program depends upon the

number of sectarian school students who happen to receive the otherwise neutral aid." 521 U.S. at 229.

This makes eminent sense. Otherwise, the constitutionality of a school choice framework would vary by geographic location, more likely to be upheld in more secular Massachusetts than in more religious South Carolina. The constitutionality of a particular program in a particular place might also vary over time, as different private schools opened or closed. This would be a highly unprincipled and uncertain approach to constitutional analysis, dependent on rapidly changing facts in different contexts.

Frankly, the majority opinion below seems to conflict with every major Establishment Clause school financing case since *Nyquist*. We urge this Court to reassert the primacy of its precedents.

CONCLUSION

This case classically satisfies all of the requirements for granting a petition for a writ of certiorari. Consequently, the American Civil Rights Union urges the Court to grant the requested petition.

Respectfully Submitted,

PETER J. FERRARA
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
1220 Rosecrans Street
Suite 325
San Diego, CA 92106
(619) 222-0770

Counsel for Amicus Curiae
American Civil Right Union